UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/657
22 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 657

Case No. 687: ARAIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Jerome Ackerman, First Vice-President; Mr. Luis de Posadas Montero, Second Vice-President;

Whereas, on 28 August 1992, Amer Salih Araim, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...to find that:

1. The Administration failed to advertise the posts of Chief of Council and Committee Services Section and of the Special Assistant to the Under-Secretary-General in the former Department of Political and Security Council Affairs (PSCA), as requested by General Assembly resolution 33/143, part I, paragraph 1(a) of 20 December 1978.

2. The Administration has failed to observe staff regulation 4.4 by filling the post of the Special Assistant to the then Under-Secretary-General of PSCA with a diplomat from the then Permanent Mission of the Soviet Union, in violation of staff rule 4.4 and PD/2/88.

3. The Office of Human Resources Management (OHRM) has once again ... [denied] him full and fair consideration for a D-1 post.

4. OHRM failed to deal with the continuing discrimination [against him]...

5. To endorse the findings of the JAB [Joint Appeals Board] Panel...

6. To award the Applicant compensation equal to two years net base salary for the injury sustained..."

Whereas the Respondent filed his answer on 20 November 1992;

Whereas the Applicant filed written observations on 12 January 1993;

Whereas, on 21 June 1994, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978, on secondment from the Government of Iraq, on a three year fixed-term appointment, as a Political Affairs Officer at the P-4 level, in the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA). On 1 June 1981, he was reassigned to the Committee Services and Research Branch of the Centre against Apartheid, within the same department. On 8 August 1981, after the Applicant's resignation from the service of his government, his appointment was extended for three years. On 1 April 1982, he was promoted to the P-5 level, as Senior Political Affairs Officer, and became Secretary of the ad hoc Committee on the Drafting of the International Convention against Apartheid in Sports and Deputy Secretary of the Special Committee against Apartheid. On 1 May 1984, he received a probationary appointment, which was converted to a permanent appointment on 1 January 1985. The Applicant has, since then, served as Secretary to various groups and committees, and as Deputy Secretary of the Special Committee against Apartheid.

On 5 September 1991, Mr. Leonid Malyev, a national of the former USSR, who served as Chief of Council and Committee Services Section, died.

On 21 October 1991, the Under-Secretary-General, PSCA, announced to the staff of his department that Mr. Evgeniy Gorkovskiy, also a national of the former USSR, who was serving in the same department as Special Assistant to the Under-Secretary-General, PSCA, at the D-1 level, had been appointed Deputy Director of Security Council and Political Committees Division and Chief of Council and Committee Services Section, with effect from 18 October 1991.

According to the records of the Joint Appeals Board (JAB) proceedings, the lateral transfer of Mr. Evgeniy Gorkovskiy to the post of Chief of Council and Committee Services Section was effected before the departmental announcement. The post of Special Assistant to the Under-Secretary-General, PSCA, vacated by the lateral transfer of Mr. Evgeniy Gorkovskiy, was filled on 30 October 1991, by the external recruitment of another citizen of the former USSR, Mr. Rollan Dzhikiya. He was given a four month fixed-term contract, expiring on 29 February 1992.

On 8 November 1991, the Applicant requested the Secretary-General to review the administrative decision not to advertise the post of Deputy Director of the Security Council and Political Committees Division and Chief of Council and Committee Services Section and to fill it by the lateral transfer of Mr. Evgeniy Gorkovskiy. Not having received a reply from the Secretary-General, on 3 January 1992, the Applicant lodged an appeal with the JAB, requesting, under staff rule 111.2(f) "the Administration to take action on this post by annulling the above mentioned departmental instruction." On 23 January 1992, the JAB adopted its report on the request for suspension of action, which concluded as follows:

> "10. Since the action the Appellant requested be suspended had already been taken, it was not possible for the JAB to make a recommendation for suspension of action.

11. Accordingly, the Panel makes no recommendation in support of the Appellant's request under staff rule 111.2(f)."

On 7 May 1992, the JAB adopted its report on the merits of the case and concluded, in part, as follows:

"Conclusion

...

17. Although application for consideration for a post does not necessarily ensure that a staff member will be selected, denial of such opportunity must certainly extinguish any such expectation. The Administration's arguments do not negate the fact that when the post in question became available, as a result of the death of the incumbent, and taking into account past injustices for which the Appellant received damages and which the Administrative Tribunal expected the Respondent to try and correct, the Appellant should have been given an opportunity to apply for the post.

18. For the foregoing reasons the Panel recommends that:

(a) Notwithstanding the restructuring of PSCA, the Appellant be afforded the opportunity to apply for whatever D-1 level posts are currently available or may become available in the Department of Political Affairs;

(b) That the Appellant be awarded $7,500 as damages for the new injury suffered."

On 16 June 1992, the Assistant Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has noted that Judgement No. 533 calls for you to receive the same fair treatment as other staff members are entitled to. He is firmly committed to ensure that you will receive the full and fair consideration to which you are entitled for any vacant D-1 post for which you are qualified.

The Secretary-General wishes to re-affirm that, with respect to the post under appeal as well as with respect to any other post, programme managers have the delegated authority under staff regulation 1.2 to rotate or transfer

staff laterally within their departments or offices, without prior consideration of each of the staff members at a lower level who might have relevant qualifications and experience. It is only after the appropriate lateral transfers have been made within the department or office that unfilled posts are considered vacant and may be advertised under the applicable procedures, if the decision is made to fill them.

As the D-1 post subject to appeal was filled laterally within the department, it never became a vacant post for which staff members at the P-5 level would have had the right to be considered. The Secretary-General, therefore, is unable to agree with the Board's conclusion that your rights were violated because you were not considered for the post, and he must reject the Board's recommendations since they are based on that conclusion.

The Secretary-General, however, is deeply concerned by your perception that you have been and continue to be the victim of discrimination in the Organization. He has decided to constitute a panel which will investigate your claims."

On 28 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration failed to advertise the post of Chief of Council and Committee Services Section, as required by General Assembly resolution 33/143 of December 1978.

2. Internal staff were not considered for the filling of the post of Special Assistant to the Under-Secretary-General, PSCA, even though, for a short temporary period, someone else filled that post.

3. The Administration has failed to deal with the continuing discrimination to which the Applicant is subjected.

Whereas the Respondent's principal contentions are:

1. Programme managers have authority to rotate or transfer staff laterally within their departments or offices. The Applicant's rights were not violated by the lateral transfer of another staff member.

2. The fact that a post is not filled pending a restructuring of the Secretariat does not violate the Applicant's rights.

The Tribunal, having deliberated from 21 June to 22 July 1994, now pronounces the following judgement:

I. In the several cases brought by the Applicant before the Tribunal three recurrent themes are prominent:

(a) He was allegedly denied promotion through the filling of vacancies without advertising them, contrary to the requirements of the relevant Staff Rules or General Assembly resolutions;

(b) The Applicant was allegedly never given full and fair consideration for vacancies that occurred from time to time, in spite of the Respondent's assurance that he would do so, following the recommendations of the JAB on different occasions and the Tribunal's Judgement No. 533; and

(c) The Applicant, along with some others, were allegedly subject to discrimination because of their ethnic origin.

The first two issues are closely related.

II. As regards the allegation of discrimination, the Respondent claims that, in the present case, this issue was not before the JAB and is therefore not within the purview of the Tribunal under article 7 of its Statute. The Tribunal notes, however, that the question of discrimination was earlier discussed at length. Whatever might be the feeling and perception of the Applicant on this matter, the Tribunal has not found specific evidence of any discrimination against him. The Applicant may feel that he has been, in one way or another, a victim of discrimination, since the Persian Gulf War. However, he has provided no proof of such discrimination.

III. The Applicant's specific complaints in the present case are (1) that when Mr. Malyev (a citizen of the former USSR), the incumbent of the D-1 post of Chief of Council and Committee Services Section died, the Respondent denied the Applicant an opportunity to be considered for the vacant post by filling it through the lateral transfer of another Soviet staff member who was then serving as Special Assistant to the Under-Secretary-General, Department of Political and Security Council Affairs, and (2) that the Respondent, by filling through external recruitment the Special Assistant post thus vacated, denied the Applicant an opportunity to be considered for it.

The Tribunal notes that although the claims relate to two posts, in reality only one vacancy might have been available to be filled by the Applicant. If the Deputy Director post had not been filled by lateral transfer of the Special Assistant, the Special Assistant post would not have become vacant. It was only because of the lateral transfer that the Special Assistant post was open.

IV. The Respondent claims that under the prevailing Vacancy Management System, the lateral transfer of a staff member at the D-1 level was within the discretion of the Under-Secretary-General in charge of the department. The Tribunal does not question this right, which is provided for in administrative instruction ST/AI/338. The Applicant, however, was not at the D-1 level. He was at the P-5 level and therefore was not eligible for a lateral transfer to the D-1 post. As it was not contemplated, at that time, that the D-1 Deputy Director post was to be, in the circumstances, filled by a promotion, the Tribunal does not consider that the Applicant has standing to challenge the lateral transfer, and the Tribunal need not consider the merits of this issue further.

V. The Tribunal notes further that the Special Assistant vacancy, resulting from the lateral transfer, was temporarily filled for a brief four-month period by a citizen of the former USSR, who was then a member of the Permanent Mission of the USSR to the United

Nations. Although subsequently, the latter post was redesignated and filled by staff members of other nationalities, the Tribunal finds, from the absence of any substantial reason for external recruitment and a pattern of filling certain posts in the department, that the Respondent had decided in advance to give priority consideration to a Soviet citizen to the exclusion of others. The Tribunal was faced with a somewhat similar situation in Judgement No. 310, Estabial (1983) and held that this constituted unfair treatment in that the Applicant did not receive the consideration to which he was entitled for the vacancy.

VI. With respect to the filling of the vacancy of the Special Assistant post, not only is the Tribunal's jurisprudence in Estabial applicable for the reasons indicated above, but the Applicant was also entitled to be considered for the post under PD/2/88, paragraph 2, which provides that "Special Assistants will be selected from among staff members", not by external recruitment. The Tribunal finds, as noted above, that the filling of the Special Assistant post by an external candidate, who was a Soviet citizen, stemmed predominantly from a determination to accord preferential treatment to a Soviet citizen, which is in conflict with the Tribunal's jurisprudence in Estabial.

VII. The only explanation given was that the four-month period "coincides with the current ... term of all Under-Secretaries-General, including myself: ... the appointment of a new Secretary-General (expected in January 1992) may give rise to certain changes in his cabinet of senior officials. In the light of this probability, I considered it appropriate that the selection of a candidate for the post should be postponed." This explanation, although understandable, is not acceptable as it does not state why this temporary appointment had to go to a citizen of the former USSR. In addition, as noted above, the failure to advertise the post and fill it, even temporarily, with a staff member was in violation of Personnel Directive PD/2/88, paragraph 2.

VIII. The Tribunal holds, therefore, that the Applicant was wrongly denied the opportunity to be considered for the D-1 post of Special Assistant, and that the responsibility of the Organization is thus engaged. The Tribunal finds no merit in the Respondent's contention, in a parallel case, that Personnel Directive PD/2/88 is inapplicable to short term temporary appointments. The unambiguous language of the provision contains no such qualification.

IX. The Tribunal also finds that while many of the arguments made by the Applicant to the Respondent are repetitious, it would have been more satisfactory if his letters had been attended to in a proper and timely manner by the Administration. Many of the letters addressed by the Applicant to various administrative officials were not answered at all or were disposed of in a dilatory, if not cavalier, way. The filling of the posts was apparently decided upon in a manner that lent an air of casualness which could and should have been avoided. The Tribunal is left with the impression that the Applicant's pleas and requests were lightly dismissed and not given the attention which they deserved.

X. The Tribunal concludes that in the procedure and the process followed in this case, the interests of the Applicant were not fully protected and he is therefore entitled to some compensation. However, the Tribunal also considers that, in the circumstances of this case, which, as noted above, actually involved one vacancy, there was, without doubt, a possibility that the number of D-1 posts would be reduced in the reorganized department and, accordingly, the chances of the Applicant to obtain a promotion would be reduced, even if he were found to be qualified for such an advancement. Also, as a practical matter, the Tribunal realizes that there is some justification for temporarily filling a post for four months without any vacancy announcement. The Tribunal recalls that the Applicant is entitled to consideration for promotion to any vacant post for which he applies and is qualified.

XI. In view of the considerations set forth above, the Tribunal orders that:

1. The Respondent pay to the Applicant the amount of U$2,000.00;

2. The Applicant be considered fully and fairly for any D-1 post that may become vacant for which he applies and is found to be qualified;

3. All other pleas of the Applicant are rejected.

(Signatures)

Samar SEN
President

Jerome ACKERMAN
First Vice-President

Luis de POSADAS MONTERO
Second Vice-President

Geneva, 22 July 1994

R. Maria VICIEN MILBUNR
Executive Secretary

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Administrative Tribunal

Distr.
LIMITED

AT/DEC/658
22 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 658

Case No. 727: ARAIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Jerome Ackerman, First Vice-President; Mr. Luis de Posadas Montero, Second Vice-President;

Whereas, on 10 May 1993, Amer Salih Araim, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...to find that:

...

2. ...the Office of Human Resources Management (OHRM) violated his rights by ignoring the reports of the Panel on Discrimination and Other Grievances dated 1 July 1991, and 1 October 1992, ...

3. ...that the Administration violated [his] rights to receive the full and fair consideration for the vacant relocated D-1 post which was occupied by the Secretary of the Special Committee against Apartheid as well as other vacant D-1 posts in the Secretariat...

4. To order the Secretary-General to submit to the Tribunal a copy of the tapes (or their transcripts) of the two meetings of the Committee on Applications for Review of Administrative Tribunal Judgements held on 1 April 1992, ...

5. To order the Secretary-General to take action immediately to end the discrimination to which the Applicant has been subjected due to his national origin, to give full and fair consideration to the Applicant's candidature for the relocated D-1 post of Secretary of the Special Committee against Apartheid as well as other D-1 posts...

6. To award the Applicant compensation equal to two years base salary for the injury sustained by him..."

Whereas the Respondent filed his answer on 24 November 1993;

Whereas, on 21 June 1994, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978, on secondment from the Government of Iraq, on a three year fixed-term appointment, as a Political Affairs Officer at the P-4 level, in the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs. On 1 June 1981, he was reassigned to the Committee Services and Research Branch of the Centre against Apartheid, within the same department. On 8 August 1981, after the Applicant's resignation from the service of his government, his appointment was extended for three years. On 1 April 1982, he was promoted to the P-5 level, as Senior Political Affairs Officer, and became Secretary of the ad hoc Committee on the Drafting of the International Convention against Apartheid in Sports and Deputy Secretary of the Special Committee against Apartheid. On 1 May 1984, he received a probationary appointment, which was converted to a permanent appointment on 1 January 1985.

In June 1991, the Secretary of the Special Committee against Apartheid died and the Applicant was appointed Acting Secretary. On 14 August 1991, the Applicant wrote to the Assistant Secretary-General, Office of Human Resources Management (OHRM), expressing an interest in the post. He stated that, in view of his previous experience, the recommendations of the Joint Appeals Board (JAB) and of the Panel on Discrimination and Other Grievances (the Panel on

Discrimination) in a prior case, he assumed his candidacy would be taken into account when the post of Secretary of the Special Committee Against Apartheid was to be filled. He further assumed that the post would be advertised soon.

In a memorandum dated 21 August 1991, the Assistant Secretary-General, Committee Against Apartheid (CAA), requested the Assistant Secretary-General, OHRM, to appoint Mr. Tesfaye Tadesse, former Permanent Representative of Ethiopia to the United Nations, temporarily, to the vacant post of Director, Office of the Assistant Secretary-General and as Secretary of the Special Committee against Apartheid, for seven months. He specified the post requirements, which involved "extensive consultations within and outside the United Nations" and necessitated a profound understanding of developments both in South Africa and in the outside world". This "sensitive political role" made it imperative that the incumbent possess "highly developed diplomatic skills and judgement". He added, "I believe that given the possible changes that the upper echelons of the Secretariat would undergo by the end of February 1992 - changes that might affect also the head of the Centre - it is more appropriate at this stage to fill this post on a temporary basis and allow myself or my successor to make a permanent appointment through the vacancy management process sometime early next year."

In a memorandum dated 3 September 1991, the Assistant Secretary-General, CAA, announced that Mr. Tesfaye Tadesse had been appointed as the Director of the Office of the Assistant Secretary-General and Secretary of the Special Committee against Apartheid.

On 18 September 1991, the Applicant requested the Secretary-General to suspend the decision. Not having received a reply, the Applicant lodged an appeal with the JAB on 18 October 1991, requesting, under staff rule 111.2(f), that the filling of this vacancy through temporary assignment be suspended until the Applicant's appeal was decided. On 31 October 1991, the JAB adopted its report, which recommended:

"...that any action to fill the post in question be suspended until 28 February 1992 or until the Panel submits its recommendation on the substance of the appeal, if earlier. This in no way, however, precludes following the normal procedures for advertising the vacancy."

In a letter dated 7 November 1991, the Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant as follows:

"The Secretary-General has examined your request for suspension of action in the light of the Board's report. The decision to fill the post temporarily through the appointment of Mr. Tadesse became effective on 3 September 1991. Such decision cannot therefore be stayed. The Secretary-General has decided therefore that your request cannot be accepted."

In its report on the merits of the case dated 29 January 1992, the JAB:

"16. ...noted that the Appellant did not bring sufficient evidence nor did he reveal any facts indicating that the Secretary-General's decision to fill the post in question with an external candidate was made in bad faith or was motivated by prejudice or any other extraneous factors.

...

19. ...trusts that when the vacancy announcement is issued, the Appellant will receive the full and fair consideration to which he is entitled and that the Administration will act in a fair manner regarding the vacancy circulation announcement and the selection process."

On 3 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant that the Secretary-General had re-examined the case in the light of the JAB report and had decided to maintain his decision. He added, "[The Secretary-General] wishes to confirm that you should be considered, in accordance with staff rule 104.14(f)(iii) and the relevant provisions of administrative instruction ST/AI/373, for current and foreseeable vacancies in your department, including the

vacancy which will arise in respect of the post which was the subject of your appeal."

On 2 March 1992, the Applicant filed with the Tribunal an application contesting this decision. In its Judgement No. 622, the Tribunal held that the Applicant was entitled to compensation for the injury sustained "by the unjustified procedure in this case [of not advertising the post] which deprived him (as well as other potential applicants), of the opportunity to be considered on the basis of comparative qualifications for the post." (Cf. Judgement No. 622, Araim (1993), paragraph VIII).

On 8 June 1992, the Applicant requested a review of the decision by the Secretary-General to extend Mr. Tadesse's appointment on a monthly basis. Mr. Tadesse was separated from the service of the United Nations on 21 July 1992. Not having received a reply to his request for administrative review, on 29 July 1992, the Applicant lodged a second appeal with the JAB. The JAB adopted its report on 2 February 1993. Its considerations and recommendation read, in part, as follows:

> "Considerations and recommendation
>
> ...
>
> 24. The Panel considered that the decision to extend Mr. Tadesse's appointment on a month-to-month basis was within the discretionary power of the Secretary-General. ...
>
> ...
>
> 26. The Panel trusts that when the selection for the post in question eventually proceeds, the Administration will act fairly regarding the selection of a candidate, and that the Appellant will receive the full and fair consideration to which he is entitled. The Panel also trusts that everyone concerned will be informed of that recommendation.
>
> ...
>
> 27. The Panel makes no other recommendation in support of the appeal."

On 5 April 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General ... agrees with the Board's recommendation and wishes to confirm that you will receive full and fair consideration for current and foreseeable vacancies including the post that was the subject of your appeal".

On 10 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to advertise the post, in violation of General Assembly resolution 33/143 and administrative instruction ST/AI/338. Mr. Tadesse's appointment was thus illegal.

2. Alleged promises cited by the Secretary of the Committee on Applications for Review of Administrative Tribunal Judgements, to the effect that the Applicant would be given fair and full consideration for a D-1 post as soon as possible, influenced the voting of Member States of the Committee against requesting an advisory opinion from the International Court of Justice.

3. The Applicant was subjected to discrimination, as was confirmed by the Panel on Discrimination in reports adopted on 1 July and 1 October 1991.

Whereas the Respondent's principal contentions are:

1. The initial appointment of Mr. Tadesse did not violate the Applicant's rights, nor did the subsequent extensions.

2. The Applicant was entitled to, and indeed received, full and fair consideration of his candidacy.

3. Allegations of discrimination on grounds of national origin have been investigated and were found to be unsubstantiated. Appeals against that decision are not properly before the Tribunal.

The Tribunal, having deliberated from 21 June to 22 July 1994, now pronounces the following judgement:

I. In a series of cases filed by the Applicant before the Tribunal, certain features are common, although the emphasis put on them has varied from time to time. In the present case, the elements which have been highlighted are: first, the charge that the Respondent has followed a systematic and malicious course of action in order to deny the right of the Applicant to "full and fair" consideration for promotion; second, and related to the first, is the contention that the Respondent carried on a campaign of reprisal against the Applicant because of the numerous cases he has brought against the Administration. Finally, the Applicant finds fault with the JAB for not examining his pleas properly (especially for the production of records of the confidential discussions of the Committee on Applications for Review of Administrative Tribunal Judgements) and for ignoring the findings of the Panel on Discrimination and Other Grievances.

II. All the above factors are mentioned and elaborated by the Applicant to sustain his main contention that, as Mr. Tesfaye Tadesse's first appointment as Secretary of the Special Committee Against Apartheid was illegal ab initio, the extensions given to him from month to month for four months were also illegal. As Mr. Tadesse's continuation prevented the Applicant from being considered for this post, he claims he is entitled to relief or compensation.

III. Mr. Tadesse's appointment, extension and final separation covered the period from 3 September 1991 to 21 July 1992. Inasmuch as the Tribunal's Judgement No. 622 was rendered on 12 November 1993, the Tribunal had knowledge of Mr. Tadesse's extensions. In awarding compensation to the Applicant in this judgement, the Tribunal had taken them into account, as well as the Respondent's justification for them.

IV. Given this background, the Tribunal has to examine whether the Applicant has now produced any new and convincing evidence to add to the consideration the Tribunal had already given to his pleas.

V. The Applicant contends that the Respondent has acted to frustrate any prospects of promotion for the Applicant. He states that by transferring the D-1 post originally attached to the Centre Against Apartheid, and placing it at the disposal of the newly re-structured Department of Political Affairs, the intention of the Respondent was to deny yet another opportunity for promotion to the Applicant. The Tribunal finds no substance in this allegation, and is satisfied that the large-scale reorganization which the Secretary-General decided to introduce was based on broad and changing needs of the United Nations and was not in any way influenced by considerations of the Applicant's advancement. Nor has the Tribunal been given any evidence that the Respondent was pursuing a vendetta against the Applicant. Such an allegation is negated totally by the letter which the Assistant Secretary-General for Human Resources Management sent on 5 August 1992, to the Chairperson of the Appointment and Promotion Board. This letter emphasizes and details the various assurances given to the Applicant for "full and fair" consideration.

VI. It seems to the Tribunal that, in large measure, the Applicant's conclusion is based on what he considers discriminatory treatment referred to in the reports of the Panel on Discrimination and other Grievances. The Tribunal notes that these reports were reviewed later and at great length by persons especially appointed by the Secretary-General to examine "Allegations of Discrimination by Mr. Amer Araim", and they produced a substantial report. The Applicant was involved in this review and irrespective of his reaction, the Tribunal finds nothing to support the view that the Applicant was victimized because of his ethnic origin or other factors.

VII. There remains therefore only one other principal contention of the Applicant, i.e. that in the Committee on Applications for Review of Administrative Tribunal Judgements, some members of the Committee did not press the Applicant's case because of an alleged commitment in his favour made by the Secretary of the Committee, on behalf of the Secretary-General. The Tribunal cannot and will not comment on how or why members vote in committees and similar bodies, and notes that the record of the Committee at the time of the voting shows no commitment on the part of the Respondent that the Applicant would be promoted.

VIII. In view of the above, the Tribunal rejects the application.

(Signatures)

Samar SEN
President

Jerome ACKERMAN
First Vice-President

Luis de POSADAS MONTERO
Second Vice-President

Geneva, 22 July 1994

R. María VICIEN MILBURN
Executive Secretary

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22 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 659

Case No. 697: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Mohammed Ali Al-Atraqchi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 28 October 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 8 October 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"...to find that:

(a) The Applicant's candidacy to [the] post of Special Assistant to the Under-Secretary-General for Political and Security Council Affairs [PSCA] was not given the 'fullest regard nor adequate consideration in a reasonable manner...';

(b) The decision not to advertise the subject post constitutes a deliberate violation of relevant Staff Rules and Regulations, [and] General Assembly resolution No. 33/143...

...

(d) [The appointment violated Personnel Directive PD/2/88, and]

(e) [General Assembly resolution 35/210 of 17 December 1990]

(f) [As well as] the principle that no post is reserved to any nationality...

(g) [That] while the Panel on Discrimination and Other Grievances, in its memorandum dated 1 July 1991 to ... [the] Assistant Secretary-General, OHRM [Office of Human Resources Management], recommended that 'the Administration should investigate and properly deal with the very subtle form of discrimination which seems to have prevailed in the [relevant] Department', this has not been done;

...

and, accordingly to order that:

(a) The contested decision be annulled;

(b) The subject post be advertised;

(c) The Applicant's candidature to a D-1 post be considered fully and fairly in accordance with the Staff Rules and Regulations and in conformity with due process;

(d) An end be put to the ongoing discrimination against the Applicant by the former Department of PSCA;

(e) That the Applicant be paid an amount equivalent to two years net salary in compensation for the unending series of violations of his right to be considered for a promotion and the clear hostility of PSCA towards him."

Whereas the Respondent filed his answer on 11 December 1992;

Whereas on 12 March 1993, the Applicant submitted an additional statement;

Whereas the Applicant filed written observations on 19 March 1993;

Whereas, on 23 June and 1 July 1994, the Tribunal put questions to the Respondent, to which he provided answers on 28 June, 1 and 7 July 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level, as an Associate Statistician, with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his

appointment was converted to a permanent appointment, and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA), as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level, as a Senior Political Affairs Officer. The Applicant separated from the service of the United Nations on 31 July 1993, having reached the mandatory retirement age.

On 5 September 1991, Mr. Leonid Malyev, a national of the former USSR, who encumbered the D-1 level post of Deputy Director of the Security Council and Political Committees Division and Chief of the Council and Committee Services Section, died. In instruction No 730 of PSCA, dated 21 October 1991, the Under-Secretary-General announced that Mr. Evgeniy Gorkovskiy, a staff member at the D-1 level and a national of the former USSR, who had been serving as Special Assistant to the Under-Secretary-General for PSCA, had been appointed Deputy Director of the Security Council and Political Committees Division and Chief of the Council and Committee Services Section, with effect from 18 October 1991.

On 30 October 1991, Mr. Rollan Dzhikiya, a Senior Counsellor at the Permanent Mission of the former USSR, was appointed Special Assistant to the Under-Secretary-General of the Department of PSCA, on a fixed-term appointment of four months, ending on 29 February 1992, as a replacement for Mr. Evgeniy Gorkovskiy.

On 25 November 1991, the Applicant requested the Secretary-General to review the administrative decision to appoint Mr. Rollan Dzhikiya to the post of Special Assistant to the Under-Secretary-General. He stated inter alia that the appointment had been made "without any advertisement of the post, as required by resolution 33/143, part 1, paragraph 1(a) of 20 December 1978" and was contrary to Personnel Directive PD/2/88 concerning the contractual status of Special Assistants. Having received no reply from the Secretary-General, on 27 January 1992, the Applicant lodged an appeal with the

Joint Appeals Board (JAB). The JAB adopted its report on 28 February 1992. Its conclusions and recommendations read, in part, as follows:

> "Conclusions and recommendations
>
> 26. In view of the Panel's unanimous finding that the Appellant's statutory right to consideration had been violated, it concluded that compensation should be awarded.
>
> ...
>
> 28. The Panel concluded unanimously that the Appellant should be considered fully and fairly for vacancies in future and that he should be compensated in the amount of $1,000 for the damage suffered as a result of the Administration's denial of his right to consideration.
>
> 29. Finally, the Panel welcomes the Respondent's assurances that the post will be advertised once it becomes vacant after 29 February 1992. ..."

On 11 May 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. Although he does not fully share the Board's reasoning, he has decided, considering that the procedure established for the appointment of Special Assistants had not been followed, to accept the Board's unanimous recommendation that you should be considered fully and fairly for vacancies in future and that you should be compensated in the amount of $1,000."

On 8 October 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's failure to advertise the post of Special Assistant to the Under-Secretary-General for PSCA and the temporary filling of that post, for approximately four months, by an external candidate, violated the Applicant's rights.

2. The Respondent's failure to investigate the Applicant's allegations of discrimination against him, in the Department of PSCA, violated his rights.

Whereas the Respondent's principal contentions are:

1. Heads of Departments have the authority to decide not to fill vacant posts.

2. The Applicant's allegations of discrimination are in the course of investigation. Insofar as the decision under appeal is concerned, there is no credible evidence that the contested decision was improperly motivated.

The Tribunal, having deliberated from 22 June to 22 July 1994, now pronounces the following judgement:

I. The post of Special Assistant to the Under-Secretary-General for PSCA became vacant as a consequence of the lateral transfer of its incumbent to the post of Deputy Director of the Security Council and Political Committees Division and Chief of the Council and Committee Services Section. The post of Special Assistant to the Under-Secretary-General for PSCA was filled by external recruitment of a citizen of the former USSR, for a period of four months. The previous incumbent of this post was also a national of the former USSR. The Applicant claimed that the post of Special Assistant to the Under-Secretary-General should have been advertised, that his candidacy should have been considered, that the appointment of an outside candidate from the former USSR showed that improper preference for the post was being accorded to citizens of that country, and that the appointment of an outside candidate violated the provisions of PD/2/88, paragraph 2 which provides that "Special Assistants will be selected from among staff members."

II. The case was duly considered by the JAB which found that compensation should be awarded in the amount of US$1,000.00. The

Secretary-General accepted the proposed recommendation in view of the fact that "the procedure established for the appointment of Special Assistants had not been followed." The Applicant was not satisfied with the amount granted as compensation, requesting that the contested decision be rescinded. He appealed to the Tribunal, requesting that the post be announced and his candidacy to a D-1 post be considered fully and fairly. He claimed to be a victim of discrimination.

III. The Applicant's claim is virtually identical to one of the claims asserted by the applicant in Judgement No. 657, Araim, (1994) rendered by the Tribunal today. For the reasons set forth in that judgement with respect to that claim, which are reproduced below, the Tribunal finds that the responsibility of the Organization is engaged:

> "III. The Applicant's specific complaints in the present case are (1) that when Mr. Malyev (a citizen of the former USSR), the incumbent of the D-1 post of Chief of Council and Committee Services Section died, the Respondent denied the Applicant an opportunity to be considered for the vacant post by filling it through the lateral transfer of another Soviet staff member who was then serving as Special Assistant to the Under-Secretary-General, Department of Political and Security Council Affairs, and (2) that the Respondent, by filling through external recruitment the Special Assistant post thus vacated, denied the Applicant an opportunity to be considered for it.
>
> The Tribunal notes that although the claims relate to two posts, in reality only one vacancy might have been available to be filled by the Applicant. If the Deputy Director post had not been filled by lateral transfer of the Special Assistant, the Special Assistant post would not have become vacant. It was only because of the lateral transfer that the Special Assistant post was open.
>
> IV. The Respondent claims that under the prevailing Vacancy Management System, the lateral transfer of a staff member at the D-1 level was within the discretion of the Under-Secretary-General in charge of the department. The Tribunal does not question this right, which is provided for in administrative instruction ST/AI/338. The Applicant, however, was not at the D-1 level. He was at the P-5 level and therefore was not eligible for a lateral transfer to the

D-1 post. As it was not contemplated, at that time, that the D-1 Deputy Director post was to be, in the circumstances, filled by a promotion, the Tribunal does not consider that the Applicant has standing to challenge the lateral transfer, and the Tribunal need not consider the merits of this issue further.

V. The Tribunal notes further that the Special Assistant vacancy, resulting from the lateral transfer, was temporarily filled for a brief four-month period by a citizen of the former USSR, who was then a member of the Permanent Mission of the USSR to the United Nations. Although subsequently, the latter post was redesignated and filled by staff members of other nationalities, the Tribunal finds, from the absence of any substantial reason for external recruitment and a pattern of filling certain posts in the department, that the Respondent had decided in advance to give priority consideration to a Soviet citizen to the exclusion of others. The Tribunal was faced with a somewhat similar situation in Judgement No. 310, Estabial (1983) and held that this constituted unfair treatment in that the Applicant did not receive the consideration to which he was entitled for the vacancy.

VI. With respect to the filling of the vacancy of the Special Assistant post, not only is the Tribunal's jurisprudence in Estabial applicable for the reasons indicated above, but the Applicant was also entitled to be considered for the post under PD/2/88, paragraph 2, which provides that 'Special Assistants will be selected from among staff members', not by external recruitment. The Tribunal finds, as noted above, that the filling of the Special Assistant post by an external candidate, who was a Soviet citizen, stemmed predominantly from a determination to accord preferential treatment to a Soviet citizen, which is in conflict with the Tribunal's jurisprudence in Estabial.

VII. The only explanation given was that the four-month period 'coincides with the current ... term of all Under-Secretaries-General, including myself: ... the appointment of a new Secretary-General (expected in January 1992) may give rise to certain changes in his cabinet of senior officials. In the light of this probability, I considered it appropriate that the selection of a candidate for the post should be postponed.' This explanation, although understandable, is not acceptable as it does not state why this temporary appointment had to go to a citizen of the former USSR. In addition, as noted above, the failure to advertise the post and fill it, even temporarily, with a staff member was in violation of Personnel Directive PD/2/88, paragraph 2.

> VIII. The Tribunal holds, therefore, that the Applicant was wrongly denied the opportunity to be considered for the D-1 post of Special Assistant, and that the responsibility of the Organization is thus engaged. The Tribunal finds no merit in the Respondent's contention, in a parallel case, that Personnel Directive PD/2/88 is inapplicable to short term temporary appointments. The unambiguous language of the provision contains no such qualification.
>
> ...
>
> X. The Tribunal concludes that in the procedure and the process followed in this case, the interests of the Applicant were not fully protected and he is therefore entitled to some compensation. However, the Tribunal also considers that, in the circumstances of this case, which, as noted above, actually involved one vacancy, there was, without doubt, a possibility that the number of D-1 posts would be reduced in the reorganized department and, accordingly, the chances of the Applicant to obtain a promotion would be reduced, even if he were found to be qualified for such an advancement. Also, as a practical matter, the Tribunal realizes that there is some justification for temporarily filling a post for four months without any vacancy announcement. ..."

IV. As far as the compensation granted to the Applicant is concerned, the Tribunal notes that the Secretary-General accepted the JAB recommendation, solely on the ground that PD/2/88 had not been observed. In the Tribunal's view, the Applicant is entitled to compensation not only on this ground but also because of the improper selection of the person who was temporarily appointed to the post, which caused further injury to the Applicant. For the foregoing reasons, the Tribunal fixes the compensation to be paid to the Applicant at US$2,000.00, in addition to the US$1,000.00 recommended by the JAB.

V. With respect to the alleged failure of the Administration to conduct an investigation of claims of discrimination asserted by the Applicant, the Tribunal notes a communication dated 1 January 1992, from the Applicant to the Director of the Office of the Under-Secretary-General for Administration and Management in which the Applicant declined to participate in a proposed investigation unless it was conducted in a manner specified by him. Hence, this

unwillingness of the Applicant to participate was a significant factor in nullifying the proposed investigation. His claim with respect to this matter is lacking in merit.

VI. In view of the foregoing, the Tribunal orders the Respondent to pay the Applicant US$2,000.00.

VII. All other pleas are rejected.

(Signatures)

Jerome Ackerman
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 22 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/660
22 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 660

Case No. 702: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Mohammed Ali Al-Atraqchi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 28 October 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 28 October 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"...to find that:

(a) The JAB [Joint Appeals Board] Panel has failed to investigate the issues involved in this case;

(b) It was well known inside the former DIESA [Department of International Economic and Social Affairs] (...) that this post [Chief, Office of the Under-Secretary-General] was earmarked for [another staff member] a protégé of ..., the former Under-Secretary-General for Administration and Management...

(c) He was not properly considered for the post in question. ... and, consequently, to award the Applicant one year's net salary in compensation."

Whereas the Respondent filed his answer on 16 December 1992;

Whereas the Applicant filed written observations on 19 February 1993;

Whereas, on 22 June 1994, the Tribunal requested the Respondent to provide the Tribunal with certain documents, which he did on 29 June 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level, as an Associate Statistician, with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent appointment, and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs, as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer. The Applicant separated from the service of the United Nations on 31 July 1993, having reached the mandatory retirement age.

The Administration announced, in Internal Vacancy Announcement 91-E-ESA-249-NY, the vacancy of the D-1 post of Chief, Office of the Under-Secretary-General in the Department of International Economic and Social Affairs (DIESA), with a deadline for applications of 8 April 1991. The post was advertised internally, within the Secretariat. Staff members at the D-1 or P-5 level were eligible to apply. The Applicant and other staff members applied. The selection was conducted under the Vacancy Management and Staff Redeployment System (VMS), established according to the

Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date, and its addenda, then in force.

On 12 July 1991, a Recruitment and Placement Officer at the Office of Human Resources Management (OHRM) informed the Applicant that his name had not been included in the short-list of candidates selected by the Appointment and Promotion Board (APB).

On 22 July 1991, the Applicant instituted a recourse procedure before the APB, asking the Board to consider him for promotion to the D-1 level and transmitting information concerning his experience and qualifications, which at the time of the APB's deliberations might not have been available to it.

In a communication dated 2 October 1991, the Secretary of the APB informed the Applicant that his recourse had been rejected and that his name "was not included in the final short-list" of candidates selected by the Board.

On 25 October 1991, the Applicant requested the Secretary-General to review the administrative decision not to appoint him to the post of Chief, Office of the Under-Secretary-General, DIESA.

On 24 December 1991, having received no reply from the Secretary-General, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 5 June 1992. Its conclusions and recommendation read as follows:

> "Conclusions and Recommendation
>
> 22. The Panel concluded that the candidature of the Appellant to the post in question was given full consideration.
>
> 23. The Panel also concluded that the decision not to select the Appellant for the post in question did not violate his rights, including his right to due process.

24. Accordingly, the Panel makes no recommendation in support of the appeal."

On 10 June 1992, the Assistant Secretary-General, OHRM, transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He agrees with the Board's conclusions that your candidature to the post in question was given full consideration and that the decision not to select you for the post did not violate your rights including your right to due process. The Secretary-General has, therefore, decided to take no further action on your case."

On 28 October 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The post for which the Applicant applied was earmarked for another staff member.

2. The JAB did not carry out a fair and objective review of the appeal, as required by staff rule 111.2(m).

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, only a right to be considered for promotion.

2. The Applicant was properly considered by the appointment and promotion bodies. As they did not short-list him among the final candidates, he became ineligible for selection under the VMS then in force. This discretionary action of the appointment and promotion bodies did not violate the Applicant's rights.

3. The Applicant's allegation that the selection process was vitiated by extraneous factors is not supported by evidence.

The Tribunal, having deliberated from 22 June to 22 July 1994, now pronounces the following judgement:

I. The Applicant claims that he was not properly considered for the post of Chief, Office of the Under-Secretary-General in the Department of International Economic and Social Affairs. He contends that, before the selection process took place, the post in question was already earmarked for the staff member who was finally selected. The selection process was conducted following the Vacancy Management and Staff Redeployment System, then in force.

The Respondent maintains that the Applicant was duly considered, that no extraneous factor vitiated the contested decision, and that staff members have no right to promotion.

II. The Tribunal notes that:

(a) The evidence shows that the Applicant was duly considered for the post.

(b) Staff members have no right to be promoted. They are only entitled to be duly considered for promotion. In Judgement No. 447, Abbas (1989), the Tribunal held that "the burden of proof of having given consideration is on the Respondent whenever a staff member questions that such consideration was given". In the Tribunal's view, the evidence before it shows that the Respondent has satisfactorily discharged this burden. The evidence is that the Applicant was duly considered by the Appointment and Promotion Board and was found not to warrant inclusion in the short list submitted to the Department.

(c) The Applicant has submitted no evidence to substantiate that extraneous factors influenced the challenged decision and that the appointment of the successful candidate was already decided upon before the selection process was set in motion.

III. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 22 July 1994

R. María VICIEN MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/661
22 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 661

Case No. 721: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 30 March 1993, Mohammed Ali Al-Atraqchi, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...to find that:

1. The JAB [Joint Appeals Board] did not carry out a fair and full investigation as required by the staff rules and specifically failed to discuss and even mention the discussions I had with Mr. [Evgeniy] Gorkovskiy [Special Assistant to the Under-Secretary-General, Department of Political and Security Council Affairs (PSCA)] to the effect that 'his Government decided to move him to the post of the late ... [Chief of Council and Committee Services Section (CCSS)], which constitutes the core of this case.

...

3. The transfer of Mr. [Evgeniy] Gorkovskiy to the post of Chief of CCSS violates the principle that no post should be the exclusive preserve of any Member State.

...

5. ...because the Secretary-General violated the principle that no post should be the exclusive preserve of any Member State, my candidacy was not given the 'fullest regard' and 'adequate consideration in a reasonable manner' regarding the vacant D-1 post.

6. That this new violation of my right to receive fair and full compensation from PSCA indicates the existence of prejudice and of a pattern of opposition to my promotion.

...

8. ...to award me compensation equal to two years net salary for this new violation of my right to receive fair and full compensation for this D-1 post."

Whereas the Respondent filed his answer on 11 June 1993;

Whereas, on 4 July 1994, the Tribunal put questions to the Respondent to which he provided answers on 6 July 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level, as an Associate Statistician, with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent appointment, and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA), as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer. The Applicant separated from the service of the United Nations on 31 July 1993, having reached the mandatory retirement age.

On 5 September 1991, Mr. Leonid Malyev, a national of the former USSR, who served as Chief of Council and Committee Services Section, died.

On 6 September 1991, the Director, Security Council and Political Committees Division, announced to the staff of the Department that "owing to the untimely death of Mr. Leonid Malyev and pending the appointment of the Chief of the Council and Committee Services Section, Mr. Qiu Yingjue [Chief, Official Reports and Proceedings Section] will act as Officer-in-Charge in the interim."

On 12 September 1991, the Applicant wrote to the Director, Security Council and Political Committees Division, stating that, in the light of past practice, it "would be fair that, in the present circumstances" he should "remain Officer-in-Charge, pending the appointment of the Chief of the Council and Committee Services Section for which [he would] be an applicant." On 3 October 1991, the Applicant sent a copy of this memorandum to the Assistant Secretary-General, Office of Human Resources Management (OHRM).

On 21 October 1991, the Under-Secretary-General in charge of PSCA, announced to the staff of his Department that Mr. Evgeniy Gorkovskiy, a national of the former USSR, who was serving in the same Department at the D-1 level, as Special Assistant to the Under-Secretary-General, had been appointed Deputy Director of the Security Council and Political Committees Division and Chief of the Council and Committee Services Section, with effect from 18 October 1991.

On 12 November 1991, the Applicant requested the Secretary-General to review the administrative decision to fill the post by lateral transfer of another staff member.

On 10 January 1992, having received no reply from the Secretary-General to his request for review, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 7 December 1992. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations and conclusions

...

21. The Panel concluded that staff regulation 4.2, which the Appellant contends should be operative in this situation, does not apply, inasmuch as it deals with the filling of vacancies. ... The Administration's action in filling the post, while within the letter of the law, was not in its spirit. As a result, a staff member with many years of experience and demonstrated fitness and with a history of being passed over, was denied, by the Administration's resort to lateral transfer, the opportunity even to apply for a post that had become vacant.

...

Recommendations

23. The Panel recommends that the Administration make every effort to address the moral injury suffered by the Appellant, as well as his material injury, i.e. non-promotion, when he and others reasonably expected he would be promoted, and loss of salary. The Panel feels, for all of the reasons mentioned above, that the staff member is entitled to compensation for the denial of the opportunity to apply for a vacated post.

24. Accordingly, the Panel recommends that the Appellant be awarded the difference in emoluments that he would have received had he been selected for the post and those he actually received, commencing from the time the post was encumbered by the lateral transfer."

On 14 January 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your appeal in the light of the Board's report. He agrees with the Board's finding that your rights under staff regulation 4.2 were not violated but does not share its conclusion that the spirit of the applicable regulations and rules was violated. He wishes to re-affirm that, with respect to the post under appeal as well as with respect to any other post, programme managers have the delegated authority under staff regulation 1.2 to rotate or transfer staff laterally within their departments or offices, without prior consideration of each of the staff members at a lower level who might have relevant qualifications and experience. It is only after the appropriate lateral transfers have been made within the department or office that unfilled posts are considered

vacant and may be advertised under the applicable procedures, if the decision is made to fill them.

The Secretary-General, therefore, cannot accept the Board's recommendation in your case. No further action in regard to your appeal will be taken. I trust, however, that you will fully participate in the investigation initiated by the Under-Secretary-General for Administration and Management in your case in order to clarify some of the issues alluded to by the Board."

On 30 March 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent does not have an absolute right to transfer staff.

2. The Applicant's candidacy was not given the "fullest regard" regarding the vacant post.

3. The transfer of Mr. Evgeniy Gorkovskiy to the post violates the principle that no post should be considered the exclusive preserve of any Member State.

4. The JAB did not carry out a fair investigation.

Whereas the Respondent's principal contentions are:

1. Heads of Departments have the authority to rotate or transfer staff laterally within their departments or offices.

2. They are entitled to fill a vacancy by lateral transfer without being limited by the nationality of the staff member transferred.

The Tribunal, having deliberated from 22 June to 22 July 1994, now pronounces the following judgement:

I. The Applicant claims that, by filling the post of Chief of Security Council and Committee Services Section through the lateral transfer of another staff member, the Administration violated the

rules and regulations then in force and followed the erroneous policy of making certain posts the preserve of certain Member States. He also submits that he has been the victim of prejudice and discrimination. The Respondent submits that he has the discretionary power to fill any post by lateral transfer instead of issuing a vacancy announcement and going through the established selection process.

II. The Applicant's claim is virtually identical to one of the claims asserted by the applicant in Judgement No. 658, Araim (1994), rendered by the Tribunal today. The reasons set forth in that judgement with respect to that claim are equally applicable to this case. They are reproduced below:

> "III. The Applicant's specific complaints in the present case are (1) that when Mr. Malyev (a citizen of the USSR), the incumbent of the D-1 post of Chief of the Council and Committee Services died, the Respondent denied the Applicant an opportunity to be considered for the vacant post by filling it through the lateral transfer of another Soviet staff member who was then serving as Special Assistant to the Under-Secretary-General, Department of Political and Security Council Affairs, and (2) that the Respondent denied the Applicant an opportunity to be considered for the Special Assistant post thus vacated, by filling it through external recruitment.
>
> The Tribunal notes that although the claims relate to two posts, in reality, only one vacancy might have been available to be filled by the Applicant. For, if the Deputy Director post had not been filled by lateral transfer of the Special Assistant, the Special Assistant post would not have become vacant; it was only because of the lateral transfer that the Special Assistant post was open.
>
> IV. The Respondent claims that under the prevailing Vacancy Management System, the lateral transfer of a staff member at the D-1 level was within the discretion of the Under-Secretary-General in charge of the department. The Tribunal does not question this right, which is provided for in administrative instruction ST/AI/338. The Applicant, however, was not at the D-1 level. He was at the P-5 level and therefore was not eligible for a lateral transfer to the D-1 post. As it was not contemplated, at that time, that the D-1 Deputy Director post was to be, in the circumstances, filled by a promotion, the Tribunal does not consider that

the Applicant has standing to challenge the lateral transfer, and the Tribunal need not consider the merits of this issue further."

III. The Tribunal therefore rejects the application in its entirety.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 22 July 1994

R. Maria VICIEN-MILBURN
Executive Secretary